Commissioner Henry M. Duque dissenting in part:

In Greek legend Sisyphus was punished in Hades for his misdeeds in life by being condemned eternally to roll a heavy stone up a hill. As he neared the top, the stone rolled down again, so that his labor was everlasting and futile. After nearly five years of litigious, protracted and costly proceeding Pacific has managed to eke out a nearly clean pass on Section 271 requirements, only to face further litigation or outright rejection. Pacific's long distance aspirations may be facing Sisyphean fate if the decision's Section 709.2 analysis and findings remain uncorrected.

I will dissent in part with respect to the analysis and findings on California Public Utilities Code Section 709.2 because the proposed decision's advisory opinion on this statute is redundant, supererogatory, and in error. In a last-ditch effort, the statute that the Legislature enacted in 1994 to permit local exchange telephone corporations[1] to offer intrastate interexchange telecommunications service ahead of the 1996 Telecommunications Act is now used in this decision as an attempt to thwart Pacific's entry into intrastate long distance market.

Section 709.2 is the state's equivalent of the 1996 Telco Act's Section 271 provisions. It was enacted in 1994 two years before the 1996 Telecommunications Act became law. It is ironic that the statue that would expand competition in the long distance market and open the local exchange service for competition ahead of the federal government's program is now manipulated in this order to forestall robust competition in California's intrastate interexhange market. If the findings of Section 709.2 succeed, Californians will stand by far to be the biggest losers.

Section 709.2 directs the Commission to authorize Pacific to enter the intrastate interexchange market conditioned upon a set of four general evaluative and partly implementation criteria. It requires: 1) non-discriminatory open access to exchanges; (2) a determination that there *is* no anticompetitive behavior by the local exchange carrier; (3) a determination that there *is* no improper cross-subsidization of intrastate exchange by requiring separate accounting records to allocate costs; and (4) a determination that there *is* no substantial possibility of harm to the competitive intrastate interexchange markets. None of these requirements establish a standard of perfect historical record and the absence of any allegations of wrongdoing on each item in order for Pacific to meet its statutory obligations before entering the long distance market. The decision misapplies these four criteria by relying on anecdotal past, specious

[1] "It is the intent of the Legislature in enacting this act that, in permitting local exchange telephone corporations to provide intrastate interexchange telecommunications service, jobs be created for California residents." SECTION 2, (j), Legislative Counsel Digest, AB 3720.
"It is the intent of the Legislature in enacting this act that California consumers of intrastate long-distance services will benefit from increased competition in the marketplace and lower intrastate interexchange rates that should result from entry of additional competitors, such as local exchange carries, into the intrastate interexchange market." SECTION 2, (k), Id.

evidence and tenuous predictions to decline an affirmative finding for three of the four criteria. By doing this, this decision stands to create an unprecedented legal battle for California interexchange market defying the intents of the Legislature and the U.S. Congress to open telephone markets for more competition.

Ironically, this Commission in a previous order, after extensive and robustly litigated proceedings, had granted an affiliate of Pacific the authority to provide in-region long distance service subject to compliance with the Section 271 requirements of the Telecommunication Act. In addition, to the extent the requirements of Section 709.2 are relevant in this phase of our advisory opinion, the underlying review criteria under this statute are essentially and in greater detail subsumed and properly addressed within the various and broader requirements of Section 271. Therefore, Section 709.2, as a matter of fact and procedure should have never been rejoined and revisited with Section 271 analysis. As laid out, the decision not only fails to make affirmative determinations on the three criteria but also neglects what Pacific must do in order to meet the decision's peculiar interpretation of the requirements aside from the implied message of "change your history" or prove a negative. Let me mention a couple of examples.

On the issue of determining whether "there is no anticompetitive behavior" by Pacific, the decision never addresses what criteria it would apply to evaluate Pacific's behavior in its dealings with competitors. Without any effort to distinguish between aggressively competitive behavior from anticompetitive behavior, the decision simplistically relies on two federal lawsuits that were filed in 1996 and 1997 by long distance carriers. One of the lawsuits was vacated on appeal. The other was remanded. Both were later settled. No findings of anticompetitive behavior were made in these cases that withstood further legal review. Citing these old and settled cases, the decision finds the "record does not support a finding that there is no anticompetitive behavior by Pacific" implying that Pacific's ***present*** behavior must not be free from anti-competitive acts. The decision provides no guidance to Pacific as to how it can reverse this finding.

On the issue of improper cross-subsidization (Section 709.2 (c) (3)), the FCC has adopted requirements in its Accounting Safeguards Order that go as far as auditing Pacific's long distance affiliate transactions periodically in addition to establishing detailed accounting separation requirements. This Commission previously adopted these standards in its order authorizing Pacific's affiliate to enter the intrastate long distance market. This decision reiterates federal equal access law, and, among others, orders Pacific to submit all scripts for long distance marketing. A straightforward reading of this section leads me to believe that if the Commission adopts the proper safeguards, Pacific would satisfy this requirement. And yet, the decision, in an apparent discounting of these facts, veers off to anecdotal and

specious evidence of Pacific's future behavior to decline an affirmative finding. Here again, the order fails to state what Pacific must do in the future to reverse this finding.

In another more ominous analysis (of Section 709.2(c)(4)), regarding whether the record supports a finding that there is no substantial possibility of harm from Pacific's entry into the long distance market, the order completely ignores the reality of the long distance telephone market. The decision finds that there is a substantial possibility of harm to long distance market due to Pacific's entry and its role as PIC administrator in a sector of the market where the classic economic definition of competition can be directly applied. It reaches this conclusion by imposing on Pacific the burden of proving the negative, that there is no substantial possibility of harm to the competitive intrastate interexchange telecommunications market.

The long distance market is a sector where there are an abundance of competitors, enormous supply in capacity, and unrestricted access to consumers, where competition has progressively pushed prices downward to unprecedented levels. The decision ignores the reality that Pacific's affiliate has zero market shares in the long distance market to begin with, whereas incumbent long distance carriers possess collectively 100% of that market. It ignores the fact that incumbent long distance providers are trying to shore up their losses to competitors by bundling their long distance services with local services and aggressively entering the local market. It ignores the fact that California's UNE prices, following the recent discounts are possibly the lowest in the nation, which provides an ideal entry point for long-distance market into the local market ahead of Pacific's entry into the long-distance market. Notwithstanding these and other crucial realities of today's regulatory and competitive environment the decision throws a potential roadblock to Pacific's entry in the long distance market by stating that there could be "a substantial possibility of harm" if it enters that market. The order equates a substantial possibility of harm to long-distance carriers' market share self-interest with a substantial possibility of harm to the consuming public interest.

Yes, generally, it is going to be possibly harmful to the self-interest of long distance service providers to lose some or any market share in that sector, just as Pacific would consider it harmful to lose any amount of its market share in the local market. To the contrary, the interest of the public is furthered when there is more competition in the long-distance market as well as in the local market as envisioned by the Telecommunications Act of 1996. The quid pro quo approach of establishing an irreversible competitive market in the local market is to be simultaneously reciprocated by granting authority to Pacific to enter the long distance market. It is expected and desirable, for that matter, that each side experiences what they might consider out of self-interest 'harmful' market losses, which each side can shore up by picking up market share in their respective new sectors. This is what our section 271 is all

about. There is a trade-off. The public interest is served well when consumers have greater and more viable options including lower prices.

The order confuses these market protection arguments of substantial possibility of harm from long distance carriers with a possibility of 'a substantial harm' to the long distance market and thus inserts a monkey wrench in an otherwise lucid and credible analysis of Section 271. Thus, regrettably this is cause for me to dissent, in part, because I believe with respect to Section 709.2, the proposed order is seriously flawed and is in want of an immediate fix.

I file this partial dissent not just as a protest but also as a means to convey my grave concerns about the analysis and findings of Section 709.2 to the Commission. The flaws of Section 709.2 analysis are jeopardizing years of efforts by the State of California to open up the local telephone market for full competition, and to enhance competition in the long distance telephone market. I urge the Commission to immediately reopen this part of the decision prior to the FCC's completion of its review and revisit these issues, examine the full record, and make the necessary affirmative determinations the statute requires us to make on Section 709.2(c) (2), (3), and (4).

For all these reasons I will respectfully dissent in part.

/s/ HENRY M. DUQUE
Henry M. Duque
Commissioner

September 19, 2002
San Francisco, California